



**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)	
)	
GILBERT R. STILES,)	
)	
Complainant,)	
)	Charge No.: 1998CF2710
and)	EEOC No.: 21B982177
)	ALS No.: 11181
LID ELECTRIC COMPANY,)	
)	
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

On February 8, 2000, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Gilbert Stiles. That complaint alleged that Respondent, Lid Electric Co., discriminated against Complainant on the basis of a physical handicap when it discharged him.

A public hearing was held on the allegations of the complaint on February 1, 2001. Subsequently, the parties filed posthearing and reply briefs. The matter is ready for decision.

FINDINGS OF FACT

Those facts marked with asterisks are facts to which the parties stipulated. The remaining facts are those which were determined to be have been proven by a preponderance of the evidence at the public hearing on this matter. Assertions made at the public hearing which are not addressed herein were

determined to be unproven or were determined to be immaterial to this decision.

1. Respondent, Lid Electric, Inc. (incorrectly named as Lid Electric Company), hired Complainant, Gilbert R. Stiles, on November 7, 1997. Complainant was hired as a journeyman electrician.*

2. Complainant was referred to Respondent by his union, IBEW, Local #134, pursuant to the union contract.*

3. Complainant has a hole in his throat. That hole is the result of a 1993 operation for cancer of the larynx. In order to speak in 1997, Complainant had to cover the hole with his hand to force air through his mouth.

4. In 1997, Complainant wore a scarf around his neck to cover the hole in his throat. He was wearing a scarf when he arrived at Respondent's work site.

5. Complainant did not disclose his physical condition in the paperwork he completed before starting work for Respondent.

6. In November of 1997, Jerry Zawilenski was one of Respondent's superintendents. Zawilenski had the responsibility for supervising the work site at which Complainant was employed.

7. Zawilenski has been an electrician since 1959, when he received his union card from Local 134. He spent eighteen years working as a journeyman electrician until he became a superintendent. Even after becoming a superintendent, Zawilenski occasionally performed some tasks as an electrician.

8. Zawilenski did not see Complainant arrive at the job site on November 7.

9. Zawilenski watched Complainant performing his work on the morning of November 7. He did so because Complainant was the new worker on the job site. Complainant was bending and installing pipe. Complainant's work pace was much slower than Zawilenski would have expected from a journeyman electrician.

10. There is no written policy that states the appropriate pace for one of Respondent's electricians.

11. After watching Complainant work for about an hour, Zawilenski talked to Complainant. Zawilenski told him that he was doing the work incorrectly and needed to work more quickly and efficiently.

12. On the afternoon of November 7, Zawilenski discharged Complainant. He gave Complainant a check for six hours' pay and a Severance Notice that stated that Complainant was discharged for inefficiency.

13. Complainant did not explain his physical condition to Zawilenski until after he was discharged. Zawilenski, though, must have gained some information about Complainant's condition through the earlier conversation with him.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. (1996) (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant established a *prima facie* case of discrimination against him on the basis of a physical handicap.

4. Respondent articulated a legitimate, non-discriminatory reason for its actions.

5. Complainant failed to prove by a preponderance of the evidence that Respondent's articulated reason is a pretext for unlawful discrimination.

DISCUSSION

Respondent, Lid Electric, Inc., hired Complainant, Gilbert R. Stiles, on November 7, 1997. Complainant was hired as a journeyman electrician. Complainant was referred to Respondent by his union, IBEW, Local #134, pursuant to the union contract.

Complainant has a hole in his throat. That hole is the result of a 1993 operation for cancer of the larynx. In order to speak in 1997, Complainant had to cover the hole with his hand to force air through his mouth. Complainant did not disclose that physical condition in the paperwork he completed before starting work for Respondent.

Complainant's tenure with Respondent was very brief. On the afternoon of November 7, Respondent discharged Complainant. Complainant received a check for six hours' pay and a Severance Notice that stated that he was discharged for inefficiency.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent discharged Complainant because of his condition. The charge further alleged that Complainant's condition constituted a physical handicap under the Human Rights Act.

The method of proving a charge of discrimination through indirect means is well established. First, Complainant must establish a *prima facie* showing of discrimination against Respondent. If he does so, Respondent must articulate a legitimate, non-discriminatory reason for its actions. For Complainant to prevail, he must then prove that Respondent's articulated reason is pretextual. **Zaderaka v. Human Rights Commission**, 131 Ill. 2d 172, 545 N.E.2d 684 (1989). See also **Texas Dep't of Community Affairs v. Burdine**, 450 U.S. 251 (1981).

To establish a *prima facie* case of handicap discrimination, Complainant had to prove three elements. He had to prove 1) that he was handicapped within the meaning of the Act, 2) that Respondent took an adverse action against him related to that handicap, and 3) that his handicap was unrelated to his ability to perform the duties of his job. **Habinka v. Human Rights Commission**, 192 Ill. App. 3d 343, 548 N.E.2d 702 (1st Dist. 1989); **Kenall Mfg. Co. v. Illinois Human Rights Commission**, 152 Ill. App. 3d 695, 504 N.E.2d 805 (1st Dist. 1987).

There is no dispute that Complainant established the first element of his *prima facie* case. Both cancer and a history of

cancer qualify as physical handicaps under the Act. **Lake Point Tower v. Illinois Human Rights Commission**, 291 Ill. App. 3d 897, 684 N.E.2d 948 (1st Dist. 1997).

Similarly, the parties agree that Complainant's condition did not affect his ability to perform work as an electrician. That agreement establishes the third element of the *prima facie* case.

The second element has two facets. First, it is necessary to show that an adverse action was taken against Complainant. Next, it must be shown that the adverse action was related to his handicap.

The first facet is uncontested. Complainant was discharged and that discharge clearly was an adverse action. The second facet, though, is disputed. Respondent argues that Complainant did not demonstrate that his condition was related to his discharge.

Respondent's argument is based upon its assertion that the decision maker could not have discriminated against Complainant on the basis of his condition because he was not aware of that condition at the time the discharge decision was made. However, the evidence at the public hearing undercut Respondent's factual assertion.

The decision to discharge Complainant was made by Jerry Zawilenski, one of Respondent's superintendents. It is true that Zawilenski was unaware of Complainant's specific physical

condition. Complainant did not disclose his physical condition in the paperwork he completed before starting work for Respondent, and he did not tell Zawilenski his condition until after Zawilenski told him about the discharge. Nonetheless, it is clear that Zawilenski had ample opportunity to learn that Complainant had some unusual physical condition even if he did not know that condition's specific definition.

Zawilenski watched Complainant performing his work on the morning of November 7. After watching him work for about an hour, Zawilenski talked to him. Complainant wore a scarf around his neck to cover the hole in his throat when he talked to Zawilenski, but he still had to block the hole when he talked. It should have been obvious to Zawilenski that Complainant had some type of serious throat problem. That information is sufficient for purposes of Complainant's *prima facie* case.

The timing of events is sufficient to complete the *prima facie* case. Complainant was discharged within a few hours of the time the decision maker first became aware that he had a physical problem. That suspicious timing is enough to establish a connection between Complainant's discharge and his handicap.

In response to that *prima facie* case, Respondent met its burden to articulate a legitimate, non-discriminatory reason for its actions. According to Zawilenski's testimony, Complainant was discharged because he was too slow and inefficient.

To prevail in this action, Complainant had to prove that

Respondent's articulated reason is a pretext for unlawful discrimination. He failed to meet that burden.

Zawilenski had the responsibility for supervising the work site at which Complainant was employed. He has been an electrician since 1959, when he first received his union card from Local 134. He spent eighteen years working as a journeyman electrician until he became a superintendent. Even after becoming a superintendent, he occasionally performed some tasks as an electrician.

Zawilenski watched Complainant perform his work for about an hour on the morning of November 7. He was watching because Complainant was the new worker on the job site. Complainant was bending and installing pipe, but his work pace was much slower than Zawilenski would have expected from a journeyman electrician.

Because of his position and his extensive experience, Zawilenski's assessment of work pace is entitled to substantial deference. That is especially true in this case because Complainant offered virtually nothing to rebut it.

Zawilenski testified that, as of the time of the discharge, Complainant still had not finished putting in the pipe in the hallway in which he had been working. He testified that Complainant should have been able to complete that space plus several more rooms. In fact, Zawilenski testified that Complainant "didn't get the first piece of pipe up" during the

first hour of observation. "Inefficiency" was the reason given for Complainant's discharge on his severance notice.

In response to that evidence, Complainant offered virtually no evidence that his work was proceeding at a reasonable pace. He testified that he could not remember how much pipe he had installed. He never denied that he failed to finish the space in which he first began work.

Zawilenski testified that Complainant could not have installed more than twenty or thirty feet of pipe and that such a pace was far too slow. Complainant never really challenged either Zawilenski's estimate of the work he had done or the conclusion that twenty or thirty feet was too little work to accomplish in the given time. The best that he could offer was that he was "working at a regular pace."

Complainant testified that he was never told that he had a work problem, but in light of the record as a whole, that testimony is highly suspect. The parties agree that Zawilenski and Complainant had a brief conversation on the morning of November 7. Complainant maintains that Zawilenski just stared closely at his neck and repeatedly said, "I don't think you can handle this job." Complainant testified that his only response was, "I'm here to do a job." On the other hand, Zawilenski testified that he told Complainant that he was doing more work than was called for and that he needed to work more efficiently.

Zawilenski may well have told Complainant that he did not

believe Complainant could handle the job. In light of the evidence in the record, such an opinion may well have been justified. It certainly makes no sense that he would fail to offer any criticism of Complainant's job pace in light of the evidence that the job pace clearly was inadequate. Moreover, up to the initiation of their conversation, Zawilenski had no evidence that Complainant had any serious health problem. Complainant did not list his condition on his paperwork and Zawilenski did not see him speak to anyone, so he could not have known that Complainant had to touch his throat to speak. It makes no sense that Zawilenski would have assumed that Complainant had a health problem simply because he wore a scarf. Thus, Zawilenski's version of the conversation seems more likely than Complainant's version and is accepted here.

Complainant also relied heavily on the fact that the union contract does not specify an amount of work, which must be done in a particular time. The contract, though, is immaterial in this case. There is no allegation that Complainant failed to meet the contract's requirements. Instead, the allegation is that he failed to work with the speed and efficiency that Respondent expected from its workers. The company's other workers appear to have met Zawilenski's standards. Certainly, Complainant offered nothing to establish that others worked at his pace. As a result, it appears that Complainant simply was not working fast enough to satisfy Zawilenski.

On the basis of the existing evidentiary record, the pretext issue is fairly simple to resolve. Respondent's articulated reason is that Complainant worked too slowly. Complainant failed to prove that his work met Respondent's productivity requirements or that Zawilenski did not genuinely believe that his work failed to meet the requirements. Thus, Complainant failed to prove that Respondent's articulated reason is a pretext. As a result, his claim must fail.

RECOMMENDATION

Based upon the foregoing, Complainant failed to prove by a preponderance of the evidence that Respondent discriminated against him on the basis of a physical handicap. Accordingly, it is recommended that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: January 10, 2002